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A

Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–23–05 OF 2013(W)

RAUS SHARIF PCA, RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASAN LAH, JEFFREY TAN AND ABU SAMAH FCJJ

2 JULY 2014

C

Contract — Building contracts — Subcontract — Claim for work done — Whether payment claimed by subcontractor subject to 'pay when paid' clause — Whether payment to subcontractor subject to 'pay when paid' clause — Whether enforceable as a pay-if-paid clause — Whether subcontractor entitled

D *for payment only upon main contractor receiving payment from employer — Whether main contractor's liability to pay subcontractor contingent upon main contractor receiving payment from employer*

E *Contract — Construction of clause — Interpretation — Objective intention of contracting parties — Building contracts — Subcontract — Meaning and effect of 'pay when paid' clause — Whether enforceable as pay-if-paid clause — Whether main contractor's liability to pay subcontractor contingent upon main contractor receiving payment from employer*

F

Contract — Termination — Construction of clause — Subcontract — 'Pay-when-paid' or 'back-to-back' clause — Intention of parties — Whether discovered from document itself — Meaning and effect of 'pay when paid' clause

G *— Whether enforceable as a pay-if-paid clause — Whether main contractor's liability to pay subcontractor contingent upon main contractor receiving payment from employer*

H Sum Projects (Brothers) Sdn Bhd ('the employer') had engaged the respondent under a contract ('the contract') as the main contractor to construct a hotel project ('the project'). In turn, under a letter of award and subcontract, the respondent appointed the appellant as its nominated subcontractor to supply and install fire protection works for the project. The terms and conditions of the contract, insofar as they related to the subcontract, applied to the appellant.

I The respondent subsequently terminated the contract on the ground that the employer had not paid the sums due and payable to the respondent. With termination of the contract, the subcontract also came to an end. The appellant then filed this action against the respondent for unpaid balance of RM460,394.49 under the subcontract. The respondent contended that by

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reason of cl 11(b) of the subcontract, it was not liable to pay the appellant until and unless it had received the monies under the contract. The trial court held that cl 11(b), which did not specifically spell out that the appellant would not be paid unless and until the respondent was paid, was not 'if' clause but 'when' clause which merely set out the time of payment but did not carry the meaning that the appellant would not be paid at all if the respondent were not paid by the employer. The trial court thus allowed the appellant's claim. The Court of Appeal allowed the respondent's appeal against this decision. The appellant hence appealed to the Federal Court on, inter alia, the following questions of law: Whether the 'pay-when-paid' provision in cl 11(b) was a provision that merely fixed the time of payment of the amount included under the architect's certificate as attributable the subcontract works namely seven days from the date of receipt of such payment by the respondent from the employer without absolving the respondent from its liability to pay the appellant, or, was otherwise a provision which prescribed the respondent's liability to pay the appellant as subject to or conditional upon the actual receipt of such payment from the employer; and whether upon termination of the subcontract due to the termination of the main contract, the appellant's entitlement to be paid under the subcontract was subject to or conditional upon actual receipt of such payment from the employer.

Held, allowing the appeal with costs:

(1) Where it is clear and unambiguous that the pay-when-paid clause is in fact a pay-if-paid clause, then the pay-when-paid clause is enforceable as a pay-if-paid clause (see para 28).

(2) Time to honour payment to the appellant was contingent upon the time that the respondent would receive payment from the employer. That which was contingent was time for payment. But the fact that time for payment was so contingent could not reasonably extend to mean that even liability of the respondent was contingent, in the sense that the respondent would walk free if the employer defaulted on the contract. For such a construction, there must be clear and unambiguous provisions to the effect that the liability of the respondent to pay the appellant, as opposed to time for payment, was contingent upon receipt of payment by the respondent from the employer (see para 32).

(3) The burden is on the party who proposes otherwise. Hence, the burden was on the respondent to show that liability for payment was contingent. Since there were no such provisions to that effect or from which that could be so construed, it could not be so read into the subcontract where it was silent, that the liability of the respondent was contingent. Time for payment of the certificates was contingent. But under cl 11(b), the liability of the respondent was not contingent. The respondent was liable even if the employer defaulted on the contract (see para 32).

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[Bahasa Malaysia summary

Sum Projects (Brothers) Sdn Bhd ('majikan') telah melantik responden di bawah kontrak ('kontrak') sebagai kontraktor utama untuk membina projek hotel ('projek'). Di bawah surat award dan subkontrak pula, responden melantik perayu sebagai subkontraktor yang dilantik untuk membekalkan dan memasang kerja perlindungan kebakaran untuk projek tersebut. Terma-terma dan syarat-syarat kontrak, setakat berkaitan subkontrak, diguna pakai kepada perayu. Responden kemudiannya menamatkan kontrak atas alasan bahawa majikan tidak membayar jumlah yang belum dibayar dan kena dibayar kepada responden. Dengan penamatan kontrak tersebut, subkontrak juga tamat. Perayu kemudiannya memfailkan tindakan ini terhadap responden untuk baki yang belum dibayar sebanyak RM460,394.49 di bawah subcontrak. Responden berhujah bahawa dengan alasan klausa 11(b) subkontrak, ia tidak bertanggungjawab untuk membayar perayu sehingga dan kecuali ia menerima wang di bawah kontrak. Mahkamah bicara memutuskan bahawa klausa 11(b), yang tidak menyatakan secara spesifik bahawa perayu tidak akan dibayar kecuali dan sehingga responden dibayar, bukan klausa 'if' tetapi klausa 'when' yang hanya menetapkan masa bayaran tetapi tidak membawa maksud bahawa perayu tidak akan dibayar terus jika responden tidak dibayar oleh majikan. Mahkamah bicara oleh itu membenarkan tuntutan perayu. Mahkamah Rayuan membenarkan rayuan responden terhadap keputusan ini. Maka perayu merayu kepada Mahkamah Persekutuan, antara lain, persoalan-persoalan undang-undang berikut: sama ada peruntukan 'pay-when-paid' dalam klausa 11(b) adalah peruntukan yang hanya menetapkan masa bayaran jumlah yang termasuk di bawah sijil arkitek seperti yang dapat dianggap kerja-kerja subkontrak iaitu tujuh hari dari tarikh penerimaan bayaran sedemikian oleh responden daripada majikan tanpa Melepaskan responden daripada tanggungjawabnya untuk membayar perayu, atau, sebaliknya peruntukan yang menyatakan tanggungjawab responden untuk membayar perayu sebagai tertakluk atau bersyarat atas penerimaan sebenar bayaran sedemikian daripada majikan; dan sama ada atas penamatan subkontrak akibat penamatan kontrak utama, hak perayu untuk dibayar di bawah subkontrak adalah tertakluk atau bersyarat atas penerimaan sebenar bayaran sedemikian daripada majikan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Apabila ia adalah jelas bahawa klausa bayar apabila dibayar adalah sebenarnya klausa bayar jika dibayar, oleh itu klausa bayar apabila dibayar adalah berkuat kuasa sebagai klausa bayar jika dibayar (lihat perenggan 28).

(2) Masa untuk membuat pembayaran kepada perayu adalah kontijen atas masa bahawa responden akan menerima bayaran daripada majikan. Apa yang di kontijen adalah masa untuk bayaran. Tetapi fakta bahawa masa

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untuk bayaran adalah di kontijen tidak dapat dilanjutkan secara munasabah untuk bermaksud walaupun liabiliti responden adalah di luar jangkaan, sehingga responden akan bebas daripadanya jika majikan mengingkari kontrak tersebut. Untuk tafsiran sedemikian, mesti terdapat peruntukan yang jelas sehingga liabiliti responden untuk membayar perayu, bertentangan masa untuk bayaran, adalah di kontijen atas penerimaan bayaran oleh responden daripada majikan (lihat perenggan 32).

(3) Beban adalah atas pihak yang mencadangkan sebaliknya. Maka, beban adalah responden untuk menunjukkan bahawa liabiliti untuk bayaran adalah kontijen. Memandangkan tidak terdapat peruntukan kepadanya atau daripada mana ia dapat ditafsirkan, ia tidak dapat dibaca di dalam subkontrak di mana ia senyap, bahawa liabiliti responden adalah kontijen. Masa untuk bayaran sijil-sijil adalah kontijen. Tetapi di bawah klausa 11(b), liabiliti responden bukan kontijen. Responden bertanggungjawab walaupun majikan mengingkari kontrak tersebut (lihat perenggan 32).]

Notes

For cases on construction of clause, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6503–6505.

For cases on subcontract, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3689–3708.

Cases referred to

AA Conte Inc v Campbell-Lowrie-Lautermilch Corp 477 NE 2d 30 (1985), CA (refd)

Aesco Steel Incorporated v JA Jones Construction Company & Fidelity & Deposit Company of Maryland United States District Court (1988) 4 Const U 310 (refd)

Antah Schindler Sdn Bhd v Ssangyong Engineering & Construction Co Ltd [2008] 3 MLJ 204; [2008] 3 CLJ 641, CA (refd)

Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd [2010] 3 MLJ 7, CA (refd)

BBR Construction Systems (M) Sdn Bhd v Maxdouble Construction (M) Sdn Bhd [2002] MLJU 104, HC (refd)

Bandar Raya Developments Bhd v Woon Hoe Kan & Sons Sdn Bhd [1972] 1 MLJ 75, FC (refd)

Bina Jati Sdn Bhd v Globe Engineering Sdn Bhd [2013] 5 MLJ 258, CA (refd)

Brightside Mechanical & Electrical Services Group Ltd & Anor v Hyundai Engineering & Construction Co Ltd [1988] SLR 186, HC (refd)

Crown House Engineering Ltd v Amec Projects Ltd (1989) 6 Const LJ 141, CA (refd)

Dawnays Ltd v F G Minter Ltd and another [1971] 2 All ER 1389, CA (refd)

Durabella Ltd v J Jarvis & Sons Ltd (2001) 83 ConLR 145, QBD (refd)

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Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689, HL (refd)
Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd [2010] MLJU 311, HC (refd)
Hong Kong Teakwood Works Ltd v Shui On Construction Co Ltd [1984] HKLR 235, HC (refd)
Iezzi Construction Pty v Currumbin Crest Development Pty v Watkins Pacific (Qld) Pty Ltd (1995) 2 Qd R 350 (refd)
Interpro Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd [1998] 1 SLR 694, HC (refd)
London Borough of Camden v Thomas McInerney & Sons Ltd (1986) 9 ConLR 99, QBD (refd)
Nicholas Acoustics & Specialty Company v H & M Construction Inc 695 F 2d 839 (5th Cir 1983); [1984] 1 ICLR 193 (refd)
Pace Construction Corporation v OBS Co Inc Fla App 531 So 2d 737 (1988) (refd)
Pernas Otis Elevators Co Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Sdn [2003] MLJU 394, HC (refd)
Rohcon Ltd v SIAC Architectural Ltd [2003] IEHC 1133S 01 (refd)
Schindler Lifts (Hong Kong) Ltd v Shui On Construction Co Ltd [1985] HKCU 17, CA (refd)
Scobie & McIntosh Ltd v Clayton Bowmore Ltd (1990) 23 ConLR 78, QBD (refd)
Seloga Jaya Sdn Bhd v UEM Genisys Sdn Bhd [2010] 3 MLJ 721, FC (refd)
Smith & Smith Glass Ltd v Winstone Architectural Cladding Systems Ltd [1992] 2 NZLR 473, HC (refd)
Tameside Metropolitan Borough Council v Barlow Securities (Group Services) Limited (2001) 75 ConLR 112; [2001] EWCA Civ 1, QBD (refd)
Thomas J Dyer Co v Bishop International Engineering (1962) Co 303 F2d 655, CA (refd)
Wo Hing Engineering Ltd v Pekko Engineering Ltd [1998] 44 BLISS 15, HC (refd)

Appeal from: Civil Appeal No W-02–1129 of 2010 (Court of Appeal, Putrajaya)

Goh Boon Yee (Chin Loi Sin with him) (BK Goh & Goh) for the appellant.
BE Teh (Teh & Associates) for the respondent.

Jeffrey Tan FCJ (delivering judgment of the court):

[1] In this appeal, the questions of law for determination are prolix. In verbatim, the 'leave questions' read as follows.

> [1] Whether the 'pay-when-paid' provision as found in clause 11(b) of the subcontract between the Main Contractor (the Respondent) and the subcontractor (the Applicant) and in paragraph 14 of the pre-subcontract Letter of Award, the

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material part of which reads:

Clause 11(b) of the subcontract:

> Within seven (7) days of the receipt by the Contractor from the Employer of the amounts included under on (sic.) Architect's Certificate for which the Contractor has made an application under Clause 11(a), the Contractor shall notify and pay to the subcontractor the total value certified therein ... less: i) Retention money, that is to say the proportion attributable to the subcontract Works of the amount retained by the Employer in accordance with the Main Contract..; and ii) The amounts previously paid.'

Paragraph 14 Letter of Award -

> Payments - Back to back basis. Within seven (7) days upon [the Contractor] receiving from the Client [Employer], 'Sum Projects (Brothers) Sdn Bhd

is a provision that merely fixes the time of payment of the amount included under the Architect's Certificate as attributable the subcontract Works namely seven days from the date of receipt of such payment by the Main Contractor from the Employer without absolving the Main Contractor from its liability to pay the subcontractor, or, is otherwise a provision which prescribes the Main Contractor's liability to pay the subcontractor as subject to or conditional upon the actual receipt of such payment from the Employer, regard being had to the conflicting decisions of the Court of Appeal in *Antah Schindler Sdn Bhd v Ssangyong Engineering & Construction Co Ltd* [2008] 3 MLJ 204; [2008] 3 CLJ 641 and *Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd* [2010] 3 MLJ 7; [2010] 3 CLJ 641.

[2] Looked at in the light of what cl 19 of the subcontract says in the first part:

> If for any reason the Contractor's employment under the Main Contract is determined (whether by the Contractor or by the Employer and whether due to any default of the Contractor or otherwise), then, the employment of the subcontract under this subcontract shall thereupon also be determined ...;

Whether in this scenario the unaccrued rights and liabilities of the parties under the 'pay-when-paid' provision of clause 11(b) read together with paragraph 14 of the Letter of Award and under Clause 11(c) of the subcontract which provides for payment of retention money upon issue of a certificate by the Architect (clause 11(c) is reproduced below) will also have to be discharged or come to an end [upon termination of the subcontract under clause 19]. And, if so, whether on termination of the subcontract there is substituted for the 'pay-when-paid' and the clause 11(c) provision a right to payment under the purview of clause 19 which states in the second part 'and the subcontractor shall be entitled to be paid: (i) the value of the subcontract Works completed at the date of such determination such value to be calculated according to Clause 10 of the subcontract ... and (ii) ... (iii) ...(iv) ... and (v) ...

Clause 11(c) of subcontract

> The Retention Money referred to above shall be dealt with in the following manner: on the issue by the Architect of any certificate or duplicate copy thereof which includes in accordance with the Main Contract the amount or any part

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thereof retained by the Employer under the Main Contract the Contractor shall pay to the subcontractor such part of the retention money as is included in the certificate or duplicate copy thereof (with interest if any).

[3] Whether upon termination of the subcontract in accordance with Clause 19 of the subcontract (due to the termination of the Main Contractor's employment under the Main Contract), the subcontractor's entitlement to be paid in Clause 19 of the subcontract for (among others) the total value of subcontract works completed on the date of termination is subject to or conditional upon actual receipt of such payment from the Employer.

[2] The background facts by contrast, are relatively straightforward. By contract dated 28 June 1996 (contract), Sum Projects (Brothers) Sdn Bhd (employer) engaged the respondent as the main contractor to execute the construction of a hotel and hotel apartment in Port Dickson described as 'Cadangan Pembangunan (1) Blok Hotel & Pangsapuri Hotel 13 Tingkat dengan Kemudahan Kolam Renang, Gimnasium, Restoran, Kedai, Bilik Mesyuarat & Daerah Perhimpunan di atas Lot 110 & 879, Jalan Rumah Rehat, Daerah Port Dickson, Negeri Sembilan' ('project'). In turn, by letter of award dated 3 August 1996, the respondent appointed the appellant as its nominated subcontractor to supply and install the required fire protection works for the project, in consideration of the sum of RM862,000. It was not in dispute that the parties later entered into a formal subcontract ('subcontract') and that the terms and conditions of the contract, insofar as they related to the subcontract, applied to the appellant. With subcontract in hand, the appellant proceeded to execute the subcontract, apparently without issue between the parties. On 6 March 1998, Certificate of Payment No 19 ('certificate/s') was issued for the contract. In relation to certificate 19, the amount certified for payment that was attributable to the subcontract was RM108,415.14, which was computed as follows:

Estimated value of total works executed by the Appellant to date - RM794,441.13

Less

(a) Retention sum - RM32,325

(b) Total progress payments previously certified - RM653,700.99

[3] But events soon transpired that led to the instant action. On 10 March 1998, the respondent terminated the contract, on the ground that the employer had not paid the sums due and payable to the respondent. It was also not in dispute that with termination of the contract, the subcontract also came to an end. By letter dated 17 March 1998, the respondent informed the appellant of the termination of the contract. By letter dated 13 April 1998, the respondent requested the appellant to confirm, which the appellant so confirmed, that its final claim amounted to RM807,011.75. By then, the total

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of RM794,441.13 had been certified for payment to the appellant. But that sum was not paid, thenceforth, to the appellant, who then filed this action against the respondent for the unpaid balance of RM460,394.49 as at 10 March 1998, inclusive of the retention sum (RM32,325), together with pre-judgment and post-judgment interest. The action was resisted by the respondent who contended that it was premature.

[4] The legal arguments at the trial were not extensively disclosed in the judgment of the trial court. But the oral evidence of the parties, which was comprehensively reproduced in the judgment of the trial court, revealed the stand of the parties with respect to the provisions of the subcontract. As per the finding of the trial court, it was the testimony of Ng Ling Ling ('DW1'), an executive director and shareholder of the respondent at the material time, that (i) the respondent was not liable to pay 'until and unless it had received the monies claimed from sum-projects' by reason of para 14 of the letter of award and cl 11(b) of the subcontract, and, (ii) the respondent 'had not received from sum-projects the monies claimed by the (appellant)' (see judgment of trial court: *Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd* [2010] MLJU 311).

[5] On the other hand, as per the finding of the trial court, it was the testimony of Tan Kay Tin ('PW2'), the chief executive officer of the appellant, that (i) pursuant to cl 19 of the subcontract, the appellant was entitled to payment on the date of termination, regardless of the receipt of payment by the respondent from the employer, (ii) the 'pay when paid' arrangement broke down upon termination of the contract and subcontract, or when the defendant sold its receivables under the main contract to UOL Factoring Sdn Bhd ('UOL') under a factoring arrangement, (iii) by letter dated 20 May 1997, the respondent informed the employer that it had entered into a factoring arrangement and served notice on the employer that all its receivables under the contract, accrued or thereafter due, had been assigned to UOL, and, (iv) the employer agreed to pay all amounts factored, as due and payable under the contract as on and from 20 May 1997, to UOL.

[6] In full, cl 19 of the subcontract read as follows:

> 19 If for any reason the Contractor's employment under the Main Contract is determined (whether by the Contractor or by the Employer and whether due to any default of the Contractor or otherwise), then, the employment of the subcontract under this subcontract shall thereupon also be determined and the subcontractor shall be entitled to be paid:
>
> (a) the value of the subcontract Works completed at the date of such determination, such value to be calculated according to Clause 10 of the subcontract;

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(b) the value of work begun and executed but not completed at the date of such determination, such value to be calculated according to Clause 10 of this subcontract;

(c) the value of any unfixed materials and goods delivered upon the site for use in the subcontract Works the property has passed to the Employer under the terms of the Main Contract;

(d) the cost of materials or goods properly ordered for the subcontract Works for which the subcontractor shall have paid or of which he is legally bound to accept delivery. On such payment by the Contractor any materials or goods so paid shall become the property of the Contractor;

(e) any reasonable cost for removal from the site of his temporary buildings, plant, machinery, appliances and goods and materials.

[7] In relation to the factoring arrangement adverted to by PW2, it was the finding of the trial court that it was the testimony of DW1 that (i) on 1 December 1997, the respondent demanded payment of the outstanding sum of RM6,992,831.95 (computed up to certificate 18) from the employer, (ii) when payment was not received, the respondent terminated the contract which resulted in the termination of the subcontract, (iii) the respondent filed action against the employer for the sum of RM8,799,995.77 (the unpaid balance of RM24,731,643.49 that had been certified for payment under certificates 1–19 and issued between 30 July 1996 and 6 March 1998), (iv) certificates 9–16 had been factored to UOL, (v) certificate 12 did not concern the subcontract, (vi) the amounts due to the appellant under certificate 11 was RM38,735.28, under certificate 13 was RM72,005.45, and under certificate 15 was RM157,177.48, (vii) certificates 11, 13 & 15 were partially factored to the UOL for RM1,257,501.50, RM550,000 and RM1,500,000, and, (viii) at the date of hearing of the trial, the employer had paid RM1.5m to UOL, towards the sum factored under certificate 15.

[8] At the conclusion of the trial, the trial court opined 'the decision in this case will revolve, to a large extent, on the interpretation of provisions in the letter of award and the subcontract and how they would impact on the liability of the (respondent) to pay its subcontractors, including the (appellant)'. Basically, on the authority of *Antah Schindler Sdn Bhd v Ssangyong Engineering & Construction Co Ltd* [2008] 3 MLJ 204; [2008] 3 CLJ 641, the trial court held that the para 14 as well as cl 11(b), since they did not specifically spell out that the appellant would not be paid unless and until the respondent was paid, were not 'if' clauses but 'when' clauses which merely set out the time of payment but did not carry the meaning that the appellant would not be paid at all if the respondent were not paid by the employer. The trial court concluded that pursuant to cl 19, the appellant was entitled to be paid upon termination of the subcontract, as 'there (was) no specific Mf provision in cl 19 that would bring the meaning that the plaintiff would only be entitled to be paid under

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cl 19 if the defendant itself is paid by sum-projects'. The trial court (i) allowed the appellant's claim of RM460,394.49 together with interest at the rate of 8% (the then prevailing rate of judgment interest) from the date of filing of the action until full settlement, and, (ii) dismissed the respondent's counter-claim on the ground that it was bereft of merit.

[9] The respondent appealed to the Court of Appeal, but only against the order allowing the claim of the appellant.

[10] At the Court of Appeal, learned counsel for the respondent submitted that the words used in the 'back to back' clause or pay-when-paid clause should be given their plain and ordinary meaning and must be construed to mean that the subcontractor would be paid only when the respondent received payment from the employer, and that a later decision of the Court of Appeal, *Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd* [2010] 3 MLJ 7, took a contrary position from *Antah Schindler* and held that the subcontractor was not entitled to any progress payment unless the same had been received by the main contractor, while learned counsel for the appellant submitted that pursuant to cl 19, the appellant was entitled to be paid upon termination of the subcontract.

[11] The Court of Appeal had no doubt that the appeal 'concerned a 'pay when paid' clause, also referred to as payment on a 'back to back basis' ' (see *Bina Jati Sdn Bhd v Globe Engineering Sdn Bhd* [2013] 5 MLJ 258 at para 25). In relation to the pay-when-paid clause, the Court of Appeal held:

> We are of the view that the clauses relied upon are clear and unambiguous. The duty of the court is to give effect to the clear intention the parties expressed in cl 11(b). Our reading of the words used in cl 11(b) of the subcontract is that cl 11(b) does more than identify the time at which certain things are required to be done. We are of the view that cl 11(b) falls within the 'if' category, to prevent a subcontractor who has done the work from being paid by reason of the party with whom he has contracted has not been paid by someone higher up the chain. That it contemplates the actual receipt by the main contractor of the sum certified. Payment from the owner was a condition precedent to the main contractor's obligation to make payment to a subcontractor.

[12] The Court of Appeal allowed the appeal of the respondent, against which the appellant appealed, that is, after leave had been granted.

[13] Before us, both learned counsel continued from where they left off at the Court of Appeal. Both filed long written submissions on the proper construction of the provisions of the subcontract, together with copious authorities on if clauses as opposed to 'when' clauses, and vice versa. But the submissions of both learned counsel overlooked the following crucial facts. The

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evidence of the respondent, which was noted by the trial court but which was not taken up and or considered by both courts below, was that (i) the Respondent had factored the receivables under certificates 9–16 to UOL, (ii) of those certificates, only certificates 11, 13 & 15 were partially factored to UOL, for RM1,257,501.50, RM550,000 and RM1,500,000 respectively, (iii) certificate 12 did not concern the subcontract, and (vi) as at the date of hearing of the trial, the employer had paid RM1.5m to UOL, towards the sum factored under certificate 15.

[14] The apex court should not make finding of facts. But we could make deductions and or conclusions based on the finding of the trial court on what was said by DW1. When taken together with other facts as found by the trial court, the purport and effect of the testimony of DW1 was that (i) the aggregate sum of RM24,731,643.49 was certified for payment under 19 certificates and issued between 30 July 1996 and 6 March 1998, (ii) up to certificate 18, the sum due from the employer to the respondent was RM6,992,831.95, (iii) hence, up to certificate 19, the amount due from the employer to the respondent was RM6,992,831.95 plus the value of certificate 19, (iv) the respondent filed action against the employer for the unpaid balance of RM8,799,995.77, (v) certificates 9–16 had been factored to UOL, (vi) of those factored certificates, only certificate 12 did not concern the subcontract, (vii) the amounts due to the appellant under certificate 11 was RM38,735.28, under certificate 13 was RM72,005.45, and under certificate 15 was RM157,177.48, (viii) certificates 11, 13 & 15 were partially factored to UOL for RM1,257,501.50, RM550,000 and RM1,500,000, and, (ix) as at the date of the trial, the employer had paid RM1.5m to UOL, towards the sum factored under certificate 15.

[15] The exact details of the factoring arrangement and or what became of it were not disclosed in the judgment of the trial court. But from the evidence of DW1, it could be deduced that (i) the respondent had been paid about 2/3 of the total value of the work certified for payment under certificates 1–19, while the appellant had received less than 1/2 of the value of the subcontract work executed up to termination of the subcontract, (ii) in relation to certificates 11, 13 and 15 which included the value of work executed by the appellant, the respondent had received RM3,357,501.50 from the factor (UOL), and, (iii) since certificates 9, 10, 12, and 14 were fully factored, the respondent would have received much more than RM3,357,501.50 from the factor. From the foregoing, it could be deduced that the respondent would have sold almost the entire receivables under certificates up to 16, to a factor, albeit at a discount. With sale of the receivables to a factor, the respondent had assigned the right to receive payment from the employer, to a factor. In return for payment, albeit at a discount, from a factor, the respondent had given up on payment from the employer. With sale of the receivables to a factor, the respondent would not be

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paid by the employer. In truth, for all intents and purposes, the respondent had been paid on certificates 9–16, albeit by the factor. By its own design, the respondent would not be paid by the employer, for work executed up to certificate 16. Given so, where the respondent by its own design would not be paid by the employer, could the respondent therefore rely on para 14 and cl 11(b) as an 'if' clause to defend the claim? For if para 14 and cl 11(b) were to be held as an 'if' clause, then would that not mean that the appellant could only be paid if the employer had paid to the respondent, which by reason of the factoring arrangement, would not materialise? The appellant would have to wait for payment till kingdom come?

[16] But was it an 'if' clause in the first place? Or was it a 'when' clause? Or was it something else? That was the same thorny question that many a court had to answer in disputes involving building contracts with provisions akin to para 14 and cl 11(b). It is safe to say that there is no unanimity of opinion on pay-when-paid clauses. Locally, there are decisions for and against both sides of the divide. In *Antah Schindler*, where the building contract contained a provision identical with the instant cl 11(b), it was held by the Court of Appeal per Suriyadi JCA, as he then was, delivering the judgment, that the pay-when-paid clause, when read with cl 27(a)(vii) (of the main contract), was a 'when' clause that merely imposed a time limit for payment:

> By the very language alluded to in the relevant provisions of the current main contract and subcontract, read together with cl 27(a)(vii), we had construed the latter as a mere provision imposing a time limit for payment. We found no express provision mounted into it which imposed any restriction over the rights of the plaintiff to pursue its claim against the defendant. Master Towie in *Smith & Smith Glass Ltd v Winstone Architectural Cladding Systems Ltd* [1992] 2 NZLR 473 had occasion to state:
>
> > While I accept that in certain cases it may be possible for persons contracting with each other in relation to a major building contract to include in their agreement clear and unambiguous conditions which have to be fulfilled before a subcontractor has the right to be paid, any such agreement would have to make it clear beyond doubt that the arrangement was to be conditional and not to be merely governing the time for payment. I believe that the contra proferentem principle would apply to such clause and that he who seeks to rely upon such a clause to show that there was a condition precedent before liability to pay arose at all should show that the clause relied upon contain no ambiguity.

[17] In *Asiapools*, the pay-when-paid clause was differently worded:

> Notwithstanding the provision of Clause 27 pertaining to nominated subcontractor and the payment for works executed, it is hereby agreed that in the event of any interim certificate which includes, for nominated subcontract works, the payment in respect of any work, 75% material or goods comprised in the subcontract shall be made to the subcontractor within 14 days after receipt by the

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Main Contractor of payment certified as due in the Interim Certificate from the Client ie Messrs Ng Chee Yee Sdn Bhd.

[18] In interpreting the aforesaid clause, the Court of Appeal per Low Hop Bing JCA, delivering the judgment of the court, laid emphasis on the word 'receipt'.

In Hong Kong, cl 11(b) of the 'Green Form' sets out the 'pay when paid' provision in the following words:

> Within five days of the receipt by the Contractor of the sum included in any certificate of the Architect, the Contractor shall notify and pay to the subcontractor the total value certified therein in respect of the subcontractor works less certain agreed deduction.

In the article entitled 'subcontractors Under Threat: A Personal View' published in 'The International Construction Law Review' Vol 5, January-October 1988, Mr Robert Jewkes viewed a similar 'pay when paid' clause in Hong Kong as a 'provision to protect the main contractor against the risk of insolvency of the employer'. He considered it as a fair and sensible provision.

The word 'receipt' in cl 11(b) has been construed by Hong Kong courts to mean 'actual payment, receipt of money': per Hunter J in *Hong Kong Teakwood Works Ltd v Shui On Construction Co Ltd* [1984] HKLR 235 (HC); and approved by the Hong Kong Court of Appeal in *Schindler Lifts (Hong Kong)Ltd v Shui On Construction Co Ltd* 29 BLR 98.

In Singapore, the 'pay when paid' clause in the subcontract substantially incorporates cl 11(b) of the Hong Kong model. In construing such a clause in *Brightside Mechanical & Electrical Services Group Ltd*, Thean J (of the Singapore HC), held at p 504 that, prima facie, cl 11(b) contemplated the actual receipt by the main contractor of the sum included in the certificate and that until the main contractor received from the owner the sum claimed by the subcontractor, the main contractor was not obliged to pay it to the subcontractor.

A similar 'pay when paid' clause was included as cl 7(ii) of the subcontract in *Interpo Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd* [1998] 1 SLR 694. Choo Han Teck JC (of the Singapore HC) held that the 'pay when paid' clause was reasonably straightforward and unambiguous, and that the plaintiff (subcontractor) was not entitled to any progress payment unless the same was received by the defendant ('main contractor') from the employer.

In Malaysia, the 'pay when paid' clause came up for judicial consideration by our High Court in *Pernas Otis Elevator Co Sdn Bhd v Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd & Anor* [2003] MLJU 394; [2004] 5 CLJ 34. There, the plaintiff was the subcontractor in a project involving the construction of a hotel. The defendants were the main contractors. The plaintiff has completed the works as stipulated under the subcontract. However, the employer complained that the lifts installed by the plaintiff had caused excessive harmonic distortions. The terms of the subcontract include, inter alia, cl 2.3(g) (the 'pay when paid' clause) in the following words ...

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Pursuant to cl 2.3(g), the defendants denied the liability to pay the plaintiff's claim, as they have not received payment of the sum from the employer.

Ramly Ali J (now JCA), after referring to the above article, and the judgments of the Hong Kong and Singapore courts, held that the defendants' liability or obligation to pay the plaintiff arose only upon the defendant having received the payment from the employer.

[19] *Asiapools* held that 'upon the true construction of cl 13.01, in particular the expression 'progress payment', we are of the view that it is sufficiently wide to include the final payment claimed by the plaintiff, in which case, the plaintiff is only entitled to payment after the defendant has been paid by the employer.' *Antah Schindler*, which was decided two years earlier, was not considered in *Asiapools* which construed the pay-when-paid clause as an if clause. We note that soon after *Asiapools*, in *Seloga Jaya Sdn Bhd v UEM Genisys Sdn Bhd* [2010] 3 MLJ 721, where one of the grounds of appeal was that the courts below had wrongly construed the 'pay when paid' clause, James Foong FCJ, delivering the judgment of the court, articulated that a 'pay when paid' clause literally means that the subcontractor will only be paid when the main contractor gets paid by the employer.

[20] In *Seloga Jaya v UEM Genisys*, the issue was not whether the 'pay when paid' clause was an 'if' or a 'when' clause, but whether the main contractor who was paid by the employer in the form of stocks could settle with the subcontractor in the same form, to which the Federal Court answered in the negative. But the facts in *Antah Schindler* and *Asiapools* are almost on all fours with the instant appeal, in that in both latter cases the main contractor was not paid by the employer and the subcontractor was not paid by the contractor who relied on a pay-when-paid clause to resist the claim of the subcontractor. *Antah Schindler* and *Asiapools* came out with different results. That was due to a difference in approach in the construction of the contract.

[21] In his paper Pay when paid clauses in subcontracts [2006] 5 MLJ cxx, Oon Chee Kheng commented 'that a survey of the cases decided in this region suggests that courts appear to have adopted a literal construction to 'pay when paid' clauses', to construe the clause as a pay if paid clause. Oon Chee Kheng then traced the cases that adopted the 'literal' approach, beginning with, namely, (i) *Schindler Lifts (Hong Kong) Ltd v Shui On Construction Co Ltd* [1985] HKCU 17, where the Court of Appeal effectively recognised the validity of the 'pay when paid' clause in the subcontract and approved the case of (ii) *Hong Kong Teakwood Works Ltd v Shui On Construction Co Ltd* [1984] HKLR 235 where the High Court held that that the word 'receipt' must be construed as actual receipt by the main contractor of the sum certified in the certificate, (iii) *Brightside Mechanical & Electrical Services Group Ltd & Anor v Hyundai Engineering & Construction Co Ltd* [1988] SLR 186, where the High

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Court followed *Teakwood* and held that the words of the 'pay when paid' clause 'contemplate actual receipt by the main contractor of the sum included in the certificate', (iv) *Interpro Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd* [1998] 1 SLR 694, where the validity of the 'pay when paid' clause was upheld by the High Court — 'It is up to the parties to provide expressly in the contract, if they so wished, that the main contractor shall assume responsibility for payment to the subcontractor in this sort of event. In the absence of such express provisions the subcontractor runs the risk that a plain reading of the 'pay when paid' clause in their contract leaves him with no remedy', (v) *BBR Construction Systems (M) Sdn Bhd v Maxdouble Construction (M) Sdn Bhd* [2002] MLJU 104, where the High Court expressly approved *Brightside*, and, (vi) *Pernas Otis Elevators Co Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Sdn* [2003] MLJU 394, where the High Court followed *Schindler Lifts, Teakwood, Brightside, and Interpro Engineering*, and held that '(the 'pay when paid' clause) must be accepted by the parties with the knowledge of the attendant risks'.

[22] The learned author equally listed out the cases that rejected the literal construction approach of the above cases, which were, namely, (i) *Smith & Smith Glass Ltd v Winstone Architectural Cladding Systems Ltd* [1992] 2 NZLR 473, where Master Towle held 'that he who seeks to rely upon such a clause to show that there was a condition precedent before liability to pay arose at all should show that the clauses relied upon contain no ambiguity ... I believe that unless the condition precedent is spelled out in clear and precise terms and accepted by both parties, the clauses ... do no more than identify the time at which certain things are required to be done, and should not be extended into the 'if category to prevent a subcontractor who has done the work from being paid by someone higher up the chain', (ii) *Iezzi Construction Pty v Currumbin Crest Development Pty v Watkins Pacific (Qld) Pty Ltd* (1995) 2 Qd R 350, where the proprietor went into liquidation and the unpaid main contractor terminated the contract and subcontract, and the 'pay when paid' defence by the main contractor against the claim of the subcontractor was rejected, (iii) *Durabella Ltd v J Jarvis & Sons Ltd* (2001) 83 ConLR 145, where it was held that a pay-when-paid clause '... can only be effective so long as the machinery of payment is capable of being operated. It is an implied condition for the operation of such a clause. If the machinery breaks down, eg certificates are not or cannot be issued as they should be, then the contractor, although it may not in any way be responsible, is nevertheless best placed to remedy the situation. If the clause is to be effective then the contractor impliedly undertakes that it will pursue all means available to obtain payment, or it will not be able to rely on the provision to defeat the subcontractor's claim', and (iv) *Thomas J Dyer Co v Bishop International Engineering* (1962) Co 303 F2d 655, where the Court of Appeal (6th Circuit) held that the 'pay-when-paid' clause was designed to effect the postponement of payment for a reasonable period after work had been completed so as to allow the main contractor opportunity to procure the necessary funds to the subcontractor, but was not to effect an indefinite

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postponement until the main contractor had himself been paid.

[23] In his article *Construction of Contingent Payment Clauses: Is There Light At The End Of The Tunnel?* [2006] 3 MLJ ix, Ir Harbans Singh said that *Smith & Smith* adopted the 'Strict Approach' (in that the court gave a narrow construction to contingent payment clauses and required the contract to be clear beyond doubt that the pay when paid clause is a pre-condition to payment and not a provision governing the time for payment) which was followed by the Hong Kong High Court in *Wo Hing Engineering Ltd v Pekko Engineering Ltd* [1998] 44 BLISS 15. According to Ir Harbans Singh, there is a third approach - the American approach - which appears to favour a mix of the literal approach and the strict approach dictated by the particular facts of the case being considered, and that under the American approach, contingent payment clauses are enforceable only if they clearly and unequivocally state that payment to the main contractor is a 'condition precedent' to his obligation to pay his subcontractor. The case cited by the learned author to illustrate the American approach was *Nicholas Acoustics & Specialty Company v H & M Construction Inc* 695 F.2d 839 (5th Cir 1983) [1984] 1 ICLR 193, where the court held that a literal reading of the contingent payment clause would lead to a 'Catch 22' situation whereby the employer would never be required to pay the main contractor until the subcontractors were paid, who in turn would not be paid until the main contractor was paid by the employer and where the court then accordingly ruled that the main contractor was obliged to pay the subcontractor within a reasonable time after completion of the work, which ruling was reaffirmed in *Aesco Steel Incorporated v JA Jones Construction Company & Fidelity & Deposit Company of Maryland United States District Court* (1988) 4 Const U 310, where the court held that the subcontractor was entitled to be paid under a contingent payment clause within a reasonable time even though the employer still had not paid the main contractor.

[24] Pertinent to the 'American approach' to pay-when-paid clauses, where such have not been outlawed, in their article *Pay-If-Paid Clauses: Freedom of Contract or Protecting the subcontractor From Itself?* (*The Construction Lawyer*, Vol 31, Number 1, Winter 2011 by the American Bar Association), William M Hill and Mary-Beth McCormack opined that pay-if-paid provisions are usually enforceable if they contain explicit language.

> Although some courts use the phrases 'pay-when-paid' and vpay-if-paid' clauses interchangeably, most courts now treat pay-when-paid clauses differently than pay-if-paid provisions. A typical pay-when-paid clause reads: Contractor shall pay subcontractor when contractor receives payment from the owner.
>
> At first glance, a logical conclusion from this language is that if the contractor does not receive payment from the owner, the contractor's obligation to pay the subcontractor never ripens. The majority of courts, however, refuse to literally enforce pay-when-paid clauses. Instead, the majority of courts construe

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A pay-when-paid provisions as 'timing' provisions, requiring payment from the general contractor to the subcontractor in a reasonable time after the work is performed, regardless of when the general contractor receives payment from the owner. 1 In short, courts refuse to permit the shift of risk of the owner's lack of payment from the general contractor to the subcontractor based on pay-when-paid B provisions. As rationale, courts usually point to the harsh effects of conditions precedent, and a general policy of avoiding them if another reasonable reading of a contract is possible. 2 But most courts adopting this interpretation of pay-when-paid clauses leave open the possibility of enforcing these provisions when the language clearly and unequivocally shifts the owner's credit risk from the general C contractor to the subcontractor. The magic language for creating an enforceable condition precedent is usually words like 'on condition that/' 'if,' 'provided that,' or by 'some other phrase that conditions performance.' 3 Clauses that attempt to capture this explicit language are typically referred to as pay-if-paid clauses.

D **[25]** Suffice it to say that there are different approaches in the construction of pay-when-paid clauses. Choo Han Teck JC, as he then was, in *Interpro Engineering v Sin Heng Construction*, articulated on the 'singapore approach' as follows:

The main argument of the plaintiffs is that cl 7 does not expressly say that the E defendants' obligation to pay the plaintiffs is conditional upon their being paid by Tavica, or that if no payment is received by the defendants the plaintiffs are not entitled to be paid. Their counsel submitted that cl 7 'merely provides for the defendants to become a sort of trustee for moneys received, being held for the benefit of the plaintiffs'. That would be reading too much into the contract, but I F accept that such clauses, indeed all contractual clauses, must be explicit and unambiguous. Clause 7(ii) appears to me reasonably straightforward and unambiguous. The plain meaning is that the plaintiffs are not entitled to any progress payments unless such payments are received by the defendants from Tavica. The result of such a reading is obvious, but some writers have expressed misgivings in construing the phrase 'receipt of payment' too narrowly. In Emsden's G *Construction Law* (1997 Ed) at para 812, the editors made the following comments:

> A number of cases in Hong Kong and Singapore have raised the question of the subcontractor's rights to payment when payment to the main contractor is withheld by the employer, and the subcontract contains a provision to the effect that payment to the subcontractor is dependent on receipt by the main H contractor of payment in respect of the subcontractor's work from the employer. The effect of these decisions is that when the employer sets off against payment due the main contractor a cross-claim for delay, the main contractor is not treated as having received payment, and so is entitled to withhold payment from the subcontractor. These decisions have been criticised on three grounds; firstly, I they give the notion of 'receipt' of money an unduly narrow meaning, requiring an actual transfer of funds rather than including a settlement by way of set-off, which would normally be sufficient to establish payment. Secondly, it seems doubtful whether the contractor's right to withhold payment should be exercisable when payment is in turn withheld by the employer on the basis of a matter which is not the fault of the subcontractor. This is almost equivalent to

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> allowing a party to take advantage of his own wrong. Thirdly, these decisions seem to overlook the requirements under the relevant form of contract (modeled on NFBTE/FASS form of subcontract for when subcontractor is nominated under the 1963 JCT form of contract) to the effect that the certificate of the architect under cl 8(a) of the subcontract is a condition precedent to the main contractor's right to claim loss or damage from the subcontractor for delay.

I do not propose to address these concerns specifically save to say that they appear to be overly sensitive to the unpaid subcontractor who, in such cases, is probably the innocent party in a building project gone awry. While the courts will readily wrap a caring arm around the weak and the meek, they cannot do so in every instance. Everyone negotiates his own contract. He is at liberty to give and take as much as he can mutually agree with the other side. The subcontractor per se is not a special species which requires special principles of law to give him a generous dose of legal protection.

There are some authority, mainly from the United States of America, such as *Pacific Lining Co Inc v Algernon-Blair Construction Co* (1987) 819 F 2d 602 which took the strong view that 'pay when paid' clauses merely have to do with the time of payment, and, therefore, do not prevent a subcontractor from being paid even though the main contractor had not been paid because of the bankruptcy of the owner. Unfortunately, this was not a reasoned judgment and does not provide much assistance. The other cases seem to be based on the desire to protect the interests of the out-of-pocket subcontractor. This approach ignores the interests of the main contractor, the freedom of contract, and the fact that contracts may differ from case to case. A 'pay when paid' clause in one contract may be worded differently from another.

[26] *Schindler Lifts, Hong Kong Teakwood,* and *Brightside* were all cited to the court in *Smith & Smith v Winstone* to support the argument of the defendant as to the meaning of the pay-when-paid clauses. However, Master Towle observed that in each of those latter cases 'applications for summary judgment were under consideration when the Court came to the view that there was an arguable defence'. It was submitted on behalf of the plaintiffs that those latter cases 'could hardly be held out as being authoritative statements of the law but merely established that it was sufficiently arguable ... to prevent the plaintiffs from obtaining summary judgment.' The following American cases were also cited in *Smith & Smith v Winstone*, namely, (i) *Pace Construction Corporation v OBS Co Inc* Fla App 531 So 2d 737 (1988), where the court held that a clause which stated that final payment shall not become due unless and until the following conditions precedent to final payment have been satisfied: ... (c) receipt of final payment for subcontractor's work by contractor from owner .. meant that payment from the owner was to be a condition precedent to the contractor's obligations to make an on payment to the subcontractor, but where the court also considered that in most subcontract agreements, payment by the owner to the contractor was not intended to be a condition precedent and agreed with the reasoning in *Peacock Construction Co Inc v Modern Air*

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Conditioning Inc Fla App 353 So 2d 840 (1977), where it was held that in order to properly shift the risk to the subcontractor, the subcontract must unambiguously express such an intention and the burden of clear expression is on the general contractor, and (ii) *AA Conte Inc v Campbell-Lowrie-Lautermilch Corp* 477 NE 2d 30 (1985), where the appeal court of the first district of Illinois held that the clause 'The current month will be paid by the 28th of the following month, provided the material so delivered is acceptable, and if payment for invoiced material has been received by Campbell-Lowrie-Lautermilch Corporation under its general contract' was a condition precedent which prevented the subcontractor from being paid until the head contractor had been paid.

[27] Master Towle disposed of the legal arguments, in the process of which the learned master also put forth the so-called 'strict' approach, as follows:

> While I accept that in certain cases it may be possible for persons contracting with each other in relation to a major building contract to include in their agreement clear and unambiguous conditions which have to be fulfilled before a subcontractor has the right to be paid, any such agreement would have to make it clear beyond doubt that the arrangement was to be conditional and not to be merely governing the time for payment. I believe that the contra proferentem principle would apply to such clauses and that he who seeks to rely upon such a clause to show that there was a condition precedent before liability to pay arose at all should show that the clauses relied upon contain no ambiguity. Mr Murphy in his article [1989 6 ICLR 196 by Harold J Murphy] suggests that before resort may be had to rules of contract 'interpretation' the Court must first find ambiguity in the contract: logic requires ambiguity to be treated as a preliminary or threshold interest. He observed at p 200:
>
> > ... The finding of a need for contract interpretation in these cases may be so big a judicial step as to amount essentially to a conclusion of law that 'pay when paid' clauses shall have limited effect. Therefore, whether ambiguity will be found depends on how courts envisage both their institutional role and the purposes of contract law in general.
>
> Later in the article Mr Murphy suggests that a consideration of overriding significance is the parties' own assessment of the project's financial risk. For the subcontractor this might mean making a financial assessment of both the contractor and the owner.
>
> For myself I believe that unless the condition precedent is spelled out in clear and precise terms and accepted by both parties, then clauses such as the two particular ones identified in this proceeding do no more than identify the time at which certain things are required to be done, and should not be extended into the 'if' category to prevent a subcontractor who has done the work from being paid merely because the party with whom he contracts has not been paid by someone higher up the chain. It may perhaps be strange that the point does not appear previously to have been argued or if argued not reported in this country, nor in Australia where similar considerations are likely to apply, but I believe that the approach which has been identified from the American decisions referred to is the correct one. In this

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particular instance I do not find it reasonably arguable that the two particular clauses governing the relationship between the present plaintiff and the defendant are of the category of being 'if' clauses rather than 'when' clauses. As such, therefore, they do not afford the basis for a reasonably arguable defence that the defendant was not obliged to pay until such time as it in turn was paid by the head contractor. As Mr Murphy has observed in his article at p 199:

> In the few cases where pay when paid clauses have been enforced to the letter, courts have usually respected the trial court's finding of fact that the parties truly directed their minds to the passing of the risk of the Owner's insolvency from the Contractor to the Subcontractor. Where, however, relevant testimony is either conflicting or insufficient such that no such finding may be made on this point, courts have typically been unwilling to presume that the Subcontractor intended to accept this risk.

In a summary judgment context I am not persuaded that the defendant has done sufficient to bring it to the threshold of credibility or that there is evidence from which the Courts might presume that Smith & Smith agreed to accept the risk of not being paid in the event of the failure of the head contractor or the owner.

[28] Since *Schindler Lifts, Hong Kong Teakwood, Brightside and Smith & Smith v Winstone* were all decided in a summary judgment context, then none could be held as authoritative on the law, that is, going by the argument in *Smith & Smith v Winstone*. But with respect, as to whether those latter four cases could be held as authoritative or not, that could not be judged on the basis that it was decided in a summary judgment context. Whether authoritative or not, in the sense of reliability and not the hierarchy of the court, that should be judged from the validity of the logic, the analysis and the legal reasoning, and whether it is error free and supported by law. In relation to logic and legal reasoning, each approach in construction has its strong and weak points, albeit to a different degree. Admittedly, there are differences in the approaches. But the differences are not really that great. For all approaches agree that where it is clear and explicit, a pay-if-paid clause is enforceable. Where they differ is only with respect to the standard of proof. While some courts construct the pay-when-paid clause as it appears in the contract, others require more than just the pay-when-paid clause. In the literal approach, it is a construction of the pay-when-paid clause. In the strict approach, the pay-when-paid clause may not be enough for a construction that it is a pay-if-paid clause. But where it is clear and unambiguous, all approaches give effect to pay-when-paid clauses. They also agree that pay-if-paid clauses are equally valid. Where it is clear and unambiguous that the pay-when-paid clause is in fact a pay-if-paid clause, then the pay-when-paid clause is enforceable as a pay-if-paid clause. 'Where it is clear and unambiguous' is the common denominator in the different approaches.

[29] Now whether it is clear and unambiguous is a matter of construction. In

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the instant case, apart from para 14 and cl 11(b), there was one other clause that had to do with interim certificates and the time for payment. Clause 30 of the contract provided:

> 30(1) At the Period of Interim Certificate named in the appendix to these Conditions the Architect shall issue a certificate stating the amount due to the Contractor from the Employer, and the Contractor shall, on presenting any such certificate to the Employer, be entitled to payment therefor within the Period for Honouring Certificates named in the appendix to these Conditions. Interim valuations shall be made whenever the Architect considers them to be necessary for the purpose of ascertaining the amount to be stated as due in an Interim Certificate.
>
> (2)The amount stated as due in an Interim Certificate shall, subject to any agreement between the parties as to stage payments, be the total value of the work properly executed and of the materials and goods delivered to or adjacent to the Works for use thereon up to and including a date not more than seven days before the date of the said certificate less any amount which may be retained by the Employer (as provided in sub-clause (3) of this Condition) and less any instalments previously paid under this Condition. Provided that such certificate shall only include the value of the said materials and goods as and from such time as they are reasonably, properly and not prematurely brought to or placed adjacent to the Works and then only if adequately protected against weather or other casualties.

[30] On the subject of the time for honouring certificates, the appendix to the contract provided:

Appendix	
Period of Interim Certificates (if none stated is one month).	30(1) ONCE A MONTH
Period for Honouring of 30(1) 30 days from Certificates (if none stated is the date of the 14 days from presentation).	30(1) 30 days from the date of the Architect's Certificate for Payment.

[31] When read together and given its plain, ordinary and natural meaning, cl 30(i) and the appendix to the main contract provided that an interim certificate would be issued once a month to the respondent and that the period to honour the amount certified for payment was 30 days from the date of the architect's certificate for payment. That simply meant that the employer had 30 days to pay the sum certified for payment to the respondent. Hence, cl 30 together with the appendix was a provision with respect to time for payment of interim certificates. Since cl 30 together with the appendix provided for 30 days to honour interim certificates, it would only follow that the subcontract could not provide for payment to the appellant before the said 30 days from the date of the architect's certificate for payment. At most, the subcontract could only provide for the same said 30 days to honour payment to the appellant. But that would cut it a bit too fine, for delays in payments in the building industry

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were and are not uncommon. Hence, the downstream cl 11(b) guardedly provided that the respondent would pay to the appellant 'Within seven (7) days of the receipt by the Contractor from the Employer of the amounts included under on Architect's Certificate for which the Contractor has made an application under Clause 11(a)'. In the scheme of things, cl 11(b) could only have been so crafted to address the contingency of delay on the part of the employer. Clause 11(b) was clearly a provision on time to honour payment to the appellant, and nothing else. Clause 11(b) had nothing to do with liability of the respondent, in the event of default by the employer. By the contract, the employer agreed to pay for work executed. And under the contract, there were no contingent payment clauses. Hence, it could not be that under the subcontract, which sat on the bedrock that the employer would pay for work executed, that there could be contingent payment clauses, in the sense that the respondent would not be liable at all to the appellant in the event of default by the employer. What cl 11(b) clearly provided was that the appellant would be paid once the respondent received payment, which was exactly what 'back to back' meant in para 14. What cl 11(b) anticipated was delay in the payment by the employer to the respondent. Hence, cl 11(b) provided 'Within seven (7) days of the receipt by the Contractor from the Employer ... '. The extra 7 days was to allow some time for payment in to be credited and for payment out to be processed.

[32] Time to honour payment to the appellant was contingent upon the time that the respondent would receive payment from the employer. That which was contingent was time for payment. But the fact that time for payment was so contingent could not reasonably extend to mean that even liability of the respondent was contingent, in the sense that the respondent would walk free MP the employer defaulted on the contract. For such a construction, there must be clear and unambiguous provisions to the effect that the liability of the respondent to pay the appellant, as opposed to time for payment, was contingent upon receipt of payment by the respondent from the employer. It must be universal truth that it need not even be said between contracting parties, that goods and services will naturally be paid by the receiving party. That is self-evident. 'So when one is concerned with a building contract one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of law, including the remedy of setting up a breach of warranty in diminution or extinction of the price of material supplied or work executed under the contract. To rebut that presumption one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract' (*Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at p 718 per Lord Diplock). The burden is on the party who proposes otherwise, to show that payment was on an NP basis. Hence, the burden was on the respondent to show that liability for payment was contingent. Since there were no such

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provisions to that effect or from which that could be so construed, it could not be so read into the subcontract where it was silent, that the liability of the respondent was contingent. Time for payment of the certificates was contingent. But under para 14 and cl 11(b), the liability of the respondent was not contingent. The respondent was liable even MP the employer defaulted on the contract (for an analogy, see *Scobie & Mcintosh Ltd v Clayton Bowmore Ltd* (1990) 23 ConLR 78, where it was held that with repudiation of the subcontract by the main contractor and which was accepted by the subcontractor, the primary obligations of the party in default which remained unperformed was substituted by a secondary obligation to compensate the subcontractor for loss sustained in consequence of the non-performance of the primary obligations).

[33] That liability was contingent was also impliedly refuted by cl 19 in the subcontract. It should not be lost that 'the purpose of an interim certificate is to provide by payments on account a cash-flow to enable the contractor to finance the work' *Crown House Engineering Ltd v Amec Projects Ltd* (1989) 6 Const LJ 141, per Slade LJ), to enable 'interim payments to be made to the contractor as the Works progress' (*Tameside Metropolitan Borough Council v Barlow Securities (Group Services) Limited* (2001) 75 ConLR 112; [2001] EWCA Civ 1). 'The primary purpose of the interim certificates in this kind of contract is to ensure that the contractor will receive regular stage payments as his work progresses' (*London Borough of Camden v Thomas McInerney & Sons Ltd* (1986) 9 ConLR 99; see also *Rohcon Ltd v SIAC Architectural Ltd* [2003] IEHC 1133S 01) so 'that the subcontractor can have the money in hand to get on with his work and the further work he has to do' (*Dawnays Ltd v F G Minter Ltd and another* [1971] 2 All ER 1389 per Lord Denning MR, which dictum was adopted by the Federal Court in *Bandar Raya Developments Bhd v Woon Hoe Kan & Sons Sdn Bhd* [1972] 1 MLJ 75). ' ... the purpose of interim certificates is to see that the contractor is in sufficient funds to carry on the construction as it progresses' (*Unpaid Interim Payment Certificates* by Vinayak Pradhan [1997] 2 MLJ xv). But with termination of the subcontract, the work thereunder would not progress any further. Given that work under the subcontract would not progress any further, there was no further purpose for stage payments to finance work that had ceased and would not progress further, such that the purpose of para 14 and cl 11(b), indeed all provisions to do with interim certificates, had no further application, as the facts on the ground had moved beyond the purview of those provisions, which were spent and passe, to the stage of cl 19. If the liability of the respondent were contingent, cl 19 would reflect that. Contingent liability was not reflected. Clause 19 merely provided that upon termination of the appellant's employment, the appellant would be paid the value of the subcontracted works completed at the date of termination. Effect must be given thereto.

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[34] Accordingly, our answers to the leave questions are as follows:

Answer to question [1]: upon its proper construction, the instant so called pay-when-paid clause was a provision that merely fixed time for payment but did not absolve the Respondent of liability to pay the amount certified and attributable to the work executed by the Appellant.

Answer to question [2]: upon termination of the subcontract, all rights and liabilities were governed by clause 19.

Answer to question [3]: upon termination of the subcontract, the entitlement of the Appellant to be paid in accordance with clause 19 was not contingent upon actual receipt by the Respondent of such payment from the employer.

[35] For the above reasons, we unanimously allow this appeal with costs. We accordingly set aside all orders of the Court of Appeal and restore all orders of the trial court.

Appeal allowed with costs.

Reported by Kanesh Sundrum